FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 13 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1958.

No. 452

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Lakefront Realty Corporation, a corporation of Illinois, et al.,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Seventh Circuit

BRIEF AND ARGUMENT OF RESPONDENTS LAKEFRONT REALTY CORPORATION, a corporation of Illinois; LAKE SHORE CLUB OF CHICAGO, a corporation of Illinois; NORTHWESTERN UNIVERSITY, a corporation of Illinois; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of City of Chicago; CITY OF CHICAGO, a municipal corporation of Illinois; RICHARD J. DALEY, individually and as Mayor of City of Chicago, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN S. MILLER,
134 South La Salle Street,
Chicago 3, Illinois,

HOWARD B. BRYANT,
30 North La Salle Street,
Chicago 2, Illinois,

RALPH B. MACK,
JOHN W. G. DOOLEY,
38 South Dearborn Street,
Chicago 3, Illinois,

Attorneys for Lakefront Realty Corporation and Lake Shore Club,

ALBAN WEBER,
619 Clark Street,
Evanston, Illinois,
Attorney for Northwestern University,

JOHN C. MELANIPHY,
Corporation Counsel of
City of Chicago,
SYDNEY R. DREBIN,
Assistant Corporation Counsel,
511 City Hall,
Chicago 2, Illinois,

Attorneys for City of Chicago, a municipal corporation; Richard J. Daley, individually and as Mayor of the City of Chicago; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

INDEX.

PAGE

Cases Cited i

Statement of the Case 2

Contentions of Respondents 5

Statutes Involved 6

Argument:

I. This case is not within the jurisdiction of this Court.

1) No federal question is involved 7

2) There is no case or controversy 11

II. This Court should not review this case.

1) The supposed federal question was not put in issue below or there decided 11

2) The decision of the Court of Appeals is not in conflict with the decisions of other circuits on the same matter 13

Conclusion 17

Cases Cited.

Angel v. Bullington (1947), 330 U.S. 183 11

Bowdidge v. Lehmann (C.A. 6, 1958), 252 F. 2d 366 15

Durley v. Mayo (1956), 351 U.S. 277 11

Florasynth Laboratories v. Goldberg (C.A. 7, 1951), 191 F. 2d 877 13

Herron v. Herron (C. A. 5, 1958), 255 F. 2d 589 15

Jacobsen v. Overseas Tankship Corp. (D.C. N.Y., 1950), 11 F.R.D. 97 13

Larter & Sons v. Dinkler Hotels Co. (C.A. Ga., 1952), 199 F. 2d 854 13

Nash-Kelvinator Corp. v. California Refrigerator Repair Shop (D.C. Cal., 1950), 11 F.R.D. 313 13
Nichols v. Alker (D.C. N.Y., 1954), 126 F. Supp. 679, affirmed 231 F. 2d 68, cert. den. 352 U.S. 829 13
Sardo v. McGrath (D.C. Cir., 1952), 196 F. 2d 20 15
Stembridge v. Georgia (1952), 343 U.S. 541 11
222 East Chestnut Street Corporation v. Board of Appeals et al., (1956), Docket number 56 S 189 (Superior Court of Cook County, Illinois) 2
222 East Chestnut Street Corporation v. Board of Appeals et al., (1956), 10 Ill. 2d 130; cert. den. (1957) 353 U.S. 984 ..... 2, 9, 14
222 East Chestnut Street Corporation v. Board of Appeals et al., (1956), 10 Ill. 2d 132 9
222 East Chestnut Street Corporation v. LaSalle Nat. Bank (C.A. 7, 1958), 253 F. 2d 485; cert. den. (October 13, 1958) 10
222 East Chestnut Street Corporation v. LaSalle Nat. Bank (1st D., 1958), 15 Ill. App. 2d 460; ptn. for lv. to appeal den. (1958) 13 Ill. 2d 9, 14
348 Bloomfield Ave. Corp. v. Montclair Mfg. Co. Inc., (D.N.J., 1950), 90 F. Supp. 1020 13
W. E. Hedger Transportation Corporation v. Ira S. Bushey & Sons (C.A. 2, 1949), 186 F. 2d 236 13
(Zoning) Board of Appeals of the City of Chicago (1955), Docket Number 524-55-Z 2

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1958.

No. 452

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Lakefront Realty Corporation, a corporation of Illinois, et al.,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
For the Seventh Circuit

BRIEF AND ARGUMENT OF RESPONDENTS LAKEFRONT REALTY CORPORATION, a corporation of Illinois; LAKE SHORE CLUB OF CHICAGO, a corporation of Illinois; NORTHWESTERN UNIVERSITY, a corporation of Illinois; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of City of Chicago; CITY OF CHICAGO, a municipal corporation of Illinois; RICHARD J. DALEY, individually and as Mayor of City of Chicago, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

These respondents oppose the granting of a writ of certiorari in this proceeding, and in support of their opposition we submit this Brief and Argument.

STATEMENT OF THE CASE.

This is a proceeding brought by petitioner to enjoin Lakefront Realty Corporation, one of the respondents, from constructing a building on a portion of its premises. The jurisdiction of the federal courts is based upon the diversity of citizenship among the parties. The action is allegedly brought pursuant to the Statutes of the State of Illinois, § 73-9, Chapter 24, Illinois Revised Statutes (1955).

The District Court sustained respondents' motion to dismiss the action and complaint. Attached to and made a part of that motion was the supporting affidavit of Marshall Keig, president of respondent Lakefront Realty Corporation, and four exhibits, three of which set forth *in haec verba* the decision reached by the Zoning Board of Appeals of the City of Chicago, Docket Number 524-55-Z (1955), the judgment of the Superior Court of Cook County affirming the Board's decision, *222 East Chestnut Street Corporation* v. *Board of Appeals*, Docket Number 56S 189 (1956), and, in turn, the judgment of the Illinois Supreme Court affirming the Superior Court decision *222 East Chestnut Street Corporation* v. *Board of Appeals*, 10 Ill. 2d 130, 139 N. E. 2d 221 (1956). These decisions were reached in prior proceedings between the petitioner and the respondents or their privies testing the right of Lakefront Realty Corporation to erect a building under the provisions of the Chicago Zoning Ordinance. Those prior proceedings were finally terminated when this Court denied petitioner's petition for writ of certiorari to the Illinois Supreme Court. *222 East Chestnut Street Corporation* v. *Board of Appeals*, 353 U. S. 984 (1957).

In the present case, petitioner appealed the adverse judgment of the District Court to the Court of Appeals.

After submission of the case to the Court of Appeals and argument of counsel, petitioner sought leave to dismiss its appeal and have the cause remanded to the District Court with leave to amend its complaint and later amended the motion. In support of its motion and the amendment to that motion, petitioner presented certain evidentiary exhibits which have been made a part of the record before this Court. Petitioner did not raise as a contested issue in the Court of Appeals the suggestion that it had been deprived of the right to meet and rebut respondents' motion to dismiss. (Opinion of the Court of Appeals, Appendix A to Petition, 5a). Petitioner now raises that issue for the first time.

The Court of Appeals, in affirming the judgment of the District Court dismissing the complaint, correctly held:

(1) that plaintiff had waived its right to file an amended complaint in the District Court by electing to stand on its complaint and appealing to the Court of Appeals, and that there was no issuable fact involved in the controversy; and

(2) that petitioner, having unsuccessfully pursued and exhausted a prior and exclusive remedy created by the statutes of Illinois, which had resulted in a holding by the Illinois court that there was no violation of the zoning ordinance, had no right of action under Sec. 73-9 of Chap. 24, Illinois Revised Statutes (1955), because that enactment applies only to relief against violations of the ordinance.

(3) that, as appears on the record, the issues which petitioner seeks to have determined in this suit were litigated in the prior action: that each of the provisions of the Chi-

cago Zoning Ordinance invoked by petitioner in this proceeding were involved in the former litigation; that the structure here in question is the same building as the one involved in the prior suit and that petitioner has previously had judicial review under Par. 265, Chapter 110, Illinois Revised Statutes (1955) of the decision of the Zoning Board of Appeals (Opinion of the Court of Appeals, Appendix A to Petition, 5 a, 6a).

CONTENTIONS OF RESPONDENTS.

Respondents contend:

1. That the Court of Appeals, in affirming the judgment of the District Court, correctly held that plaintiff had waived its right to file an amended complaint in the District Court by electing to stand on the complaint it filed.

2. That no issue of fact is involved in this controversy.

3. That the Court of Appeals correctly held:

(a) that plaintiff's action was founded on the theory that petitioner had a right of action under Sec. 73-9 of Chap. 24 of the Illinois Revised Statutes (1955).

(b) that the right of action referred to in that section was based on a violation of the zoning ordinance.

(c) that no violation of the zoning ordinance was involved in this case but, on the contrary, the Illinois courts had correctly held that the construction did not constitute a violation of the ordinance.

4. That, therefore, the writ of certiorari should not be granted because:

(a) no federal question is involved, and

(b) there is no case or controversy between the parties to this action.

5. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals in the same matter and the supposed federal question is urged for the first time before this Court.

STATUTES INVOLVED.

Following are all the relevant portions of the statutory provisions referred to herein:

Illinois Cities and Villages Act.
(Illinois Revised Statutes, 1955, Chapter 24, pars. 73-6.01 and 73-9)

"73-6.01. (Review) All final administrative decisions of the board of appeals under this article shall be subject to judicial review pursuant to the provisions of the Administrative Review act," * * *"

"73-9. (Proceedings to prevent violation). In case any building or structure is constructed, reconstructed, altered repaired, converted or maintained, or any building, structure or land is used in violation of this article * * * the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building * * * may institute any appropriate action or proceeding * * * (4) to restrain, correct or abate the violation.

Illinois Administrative Review Act.
Illinois Revised Statutes, 1955, Chapter 110, par. 265)

"265. § 2 (Scope of Act). This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof."

ARGUMENT.

I.

THIS CASE IS NOT WITHIN THE JURISDICTION OF THIS COURT.

1) No federal question is involved.

The right which petitioner attempts to assert in this action arises, if at all, under the laws of Illinois. Petitioner's complaint is specifically based on §73-9, Chapter 24, Illinois Revised Statutes (1955). Its gravamen is that the proposed structure of respondent Lakefront Realty Corporation is in violation of the Chicago Zoning Ordinance.

The decision of the Court of Appeals is expressly based upon the construction and application of the statutes of Illinois; the one, specifically applicable in unambiguous terms to the abatement and prevention of zoning violations, the very statute upon which petitioner supposedly relies; the other, the Illinois Administrative Review Act which provides an exclusive remedy for the judicial review of the decisions of administrative agencies, a remedy which the legislature of Illinois has made applicable to the review of the decisions of Zoning Boards of Appeals and a remedy which the present petitioner has pursued and exhausted in prior proceedings between petitioner and the respondents or their privies.

The Court of Appeals held that § 73-9 gave no right of action to petitioner, saying at pages 5a, 6a, Appendix A to petition:

> "* * * 73-9 applies only where there is a violation of the zoning ordinance and of course where there is no such violation § 73-9 is inapplicable.

"The plaintiff-appellant has attempted, by judicial review pursuant to § 73-6.01 of the Zoning Act, to set aside the findings and order of the Zoning Board of Appeals that the proposed construction was a permitted use * * *

"* * * the Zoning Board of Appeals * * * after a full hearing with the plaintiff appearing and objecting * * * found that the proposed construction would be a permitted use and would not be in violation of the zoning ordinance.

"Thereafter, this plaintiff filed a proceeding in the Superior Court of Cook County, Illinois to review the decision and order of the Zoning Board of Appeals. The judgment of that court is attached to the affidavit in support of the motion to dismiss wherein the reviewing court specifically found that the finding and decision of the Zoning Board of Appeals that the proposed construction 'was a permitted use under the applicable provisions of the Chicago Zoning Ordinance, was not against the manifest weight of the evidence and is well founded on the evidence presented;' and 'that the decision of the Zoning Board of Appeals of the City of Chicago * * * be and the same hereby is affirmed and approved.'

"Plaintiff appealed from that judgment to the Supreme Court of Illinois. The opinion of that court, reported at 10 Ill. 2d 130, is also attached to the affidavit in support of the motion to dismiss. The Supreme Court of Illinois affirmed the judgment of the Superior Court of Cook County. Hence the proposed construction is not in violation of the Chicago Zoning Ordinance and, therefore, any right of action predicated on § 73-9 completely collapses."

Section 2 of the Illinois Administrative Review Act provides in part, that:

"* * * any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the

effective date hereof." (§ 265, C. 110, Ill. Rev. Stat, 1955).

In construing this Statute, the Court of Appeals held that:

> "There is but one method of attack and that is by judicial review pursuant to the provisions of the Illinois Administrative Review Act, Section 73-9 cannot be used for that purpose. It is specifically prohibited by the Administrative Review Act." (page 6a, Appendix A to petition)

The Illinois Statutes involved are explicit in their terms and admit of no other interpretation or application than that accorded them by the Court of Appeals. Its decision is wholly consonant with those reached by the Courts of Illinois.

In *322 East Chestnut Street Corp.* v. *Board of Appeals*, 10 Ill. 2d 132, 135 (1956), the Illinois Supreme Court held that § 73-9 applies only to the enforcement of the Zoning Ordinance. In *222 East Chestnut Street Corp.* v. *Board of Appeals*, 10 Ill. 2d 130, 132 (1956), the former action between the parties to this suit, the Illinois Supreme Court held that "* * * the plaintiff (petitioner here) is not aided by section 73-9 of the Revised Cities and Villages Act * * * providing that an action * * * to prevent a zoning violation may be instituted by * * * an owner or tenant of real property in the same contiguous zoning district." That same court further held that petitioner was not adversely affected by respondent Lakefront Realty Corporation's proposed structure, and a petition for writ of certiorari filed in the United States Supreme Court was denied. 353 U.S. 984 (1957).

In *222 East Chestnut Street Corp.* v. *LaSalle National Bank*, 15 Ill. App. 2d 460 (1957), petition for leave to appeal denied, 13 Ill. 2d advance sheet number 8, May

Term, 1958, Illinois Supreme Court, the Appellate Court of Illinois held that § 73-9 did not make any change in the organic law of Illinois and that the plaintiff must still allege and prove itself to be irreparably damaged before injunction could issue under the provisions of the very statute on which petitioner bases its right in this action. Petitioner neither can, nor do we understand that it does, controvert the fact that the Illinois Supreme Court has held that 222 East Chestnut Street Corporation is not adversely affected by respondent's actions. Petitioner's complaint filed in the District Court alleged merely that respondents' acts "would cause plaintiff immediate and irreparable damage and injury", the insufficiency of which, as a matter of pleading, is evident. In face of the conclusive determination that petitioner failed to show that it was adversely affected by respondents' actions, the decision of the Court of Appeals was inescapable.

This Court has seen no reason to disturb the same construction of the identical Illinois Statutes by the Court of Appeals in the recent case of *222 East Chestnut Street Corporation* v. *LaSalle National Bank*, 253 Fed. 2d 485 (C.A. 7, 1958), cert. den. October 13, 1958.

Petitioner asserts that it has, in the numerous actions between it and the respondents, been deprived of "due process". This insistence arose for the first time in the present action after the hearings below and at the moment when the case was at the point of decision. This contention ignores the fact that the violation of due process prohibited by the Constitution of the United States is the deprivation of "life, liberty or property" without due process of law. (U. S. Constitution, Amendment XIV, Section 1.)

Since as held by the Illinois Courts there was no violation of the Chicago Zoning Ordinance, petitioner obvi-

ously had no property of which it has been or can be deprived and hence no grounds upon which to base a claim of such deprivation.

The decision here attacked is based upon an interpretation of Illinois Statutes in accord with the construction of those same laws by the courts of Illinois. The decision below did not involve any federal question. It is concerned only with the laws of Illinois and as such its decision is not reviewable by this Court. *Darley* v. *Mayo*, 351 U. S. 277, 280-285 (1956); *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *Angel* v. *Bullington*, 330 U.S. 183, 191-192 (1947).

2) There is no case or controversy between the parties to this action.

Moreover, the issues and controversy between petitioner and the respondents have been rendered moot by prior proceedings. The Court of Appeals properly held that this suit presented no issuable fact. There is here no case or controversy to which the judicial power of the United States can extend. (U.S. Constitution, Article III, Section 2.)

For this reason, the petition should be denied.

II.

THIS COURT SHOULD NOT REVIEW THIS CASE.

1) The supposed federal question now urged by petitioner was neither put in issue in the court below nor there decided.

Petitioner is now for the first time urging before this Court the proposition that, on a motion to dismiss, matters outside the pleadings may not be considered and that it had no reasonable opportunity of presenting such matters to the District Court.

Respondents attached to and made a part of their motion to dismiss a supporting affidavit and the judgments handed down in the prior proceedings between the parties to this suit.

Petitioner did not contest before the Court of Appeals the Court's right to consider these matters. Indeed, on its motion for leave to dismiss its appeal and amend its complaint and on its amendment to that motion, petitioner based its right and its prayer on Rule 15, Federal Rules of Civil Procedure. Petitioner did not then contend that it had been deprived of any opportunity to file briefs or counter-affidavits in the District Court.

The objection that petitioner had no opportunity of meeting the Motion or filing counter-affidavits is groundless. (Opinion of Court of Appeals, Appendix A to Petition, 5a).

Any question as to whether or not respondents' affidavit and the judgments of the Zoning Board of Appeals of Chicago, the Superior Court of Cook County and the Illinois Supreme Court could be considered on the motion to dismiss, is resolved by the provisions of Rule 12 (b), Federal Rules of Civil Procedure. The Court is there empowered to consider "matters outside the pleading." Respondents' motion was based upon (1) the Court's lack of jurisdiction of the subject matter; (2) the bar of *res judicata*; (3) the estoppel of former judgment, and (4) as a matter of law, the express bar of Par. 265 of Chapter 110 of the Illinois Revised Statutes and the fact that § 73-9 of Chapter 24 of the Illinois Revised Statutes, on which petitioner relies, gave no right of action to petitioner.

Respondents presented these matters by motion as they had the right to do under Rule 12(b) as well as under the de-

cided cases. *Nichols* v. *Alker* (D.C. N.Y. 1954) 126 F. Supp. 679, affirmed 231 F. 2d, 68, cert. denied 352 U.S. 829; *Larter & Sons* v. *Dinkler Hotels Co.* (C.A. Ga. 1952) 199 F. 2d 854; *Florasynth Laboratories* v. *Goldberg* (C.A. 7, 1951) 191 F. 2d 877; *348 Bloomfield Ave. Corp.* v. *Montclair Mfg. Co. Inc.*, (D. N.J. 1950) 90 F. Supp. 1020; *Nash-Kelvinator Corp.* v. *California Refrigerator Repair Shop* (DC Cal. 1950), 11 F.R.D. 313; *Jacobsen* v. *Overseas Tankship Corp.* (D.C. N.Y. 1950) 11 F.R.D. 97; *W. E. Hedger Transportation Corporation* v. *Ira S. Bushey & Sons* (C.A. 2, 1949) 186 F. 2d 236. The defenses so asserted go not merely to petitioner's failure to state a claim upon which relief can be granted. They also expressly contest the jurisdiction of the Court. These defenses, in substance, consist of the Statutes of Illinois and the judgments *in haec verba* of the tribunals which heard the prior proceedings between the parties to this action. In a word, the matters relied upon by respondents go uncontroverted because they are uncontrovertible.

For this reason, the petition should be denied.

2) The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter.

The Court of Appeals decided that petitioner had no right of action based on § 73-9 of Chapter 24 of the Illinois Revised Statutes, the statute under which this proceeding is brought. It further held Par. 265 of Chapter 110 of the Illinois Revised Statutes prohibited the maintenance of the present suit.

In passing upon petitioner's motion to dismiss its appeal and for leave to amend its complaint filed after submission of the case to the Court of Appeals, after the argument

of counsel there, and when the case was at the point of decision, the Court of Appeals indicated that:

> "'When the District Court entered its order on October 31, 1957 dismissing plaintiff's action the plaintiff, as no responsive pleading had been served by the defendants, had, in the alternative, the right as a matter of course to amend its complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure or the right to stand on its complaint and appeal from the judgment of dismissal. The plaintiff appealed and by so doing elected to stand on its complaint. *Asher v. Ruppa*, 7 Cir., 1949, 173 F. 2d 10." (page 3a, Appendix A to petition.)

This holding in no way conflicts with the decisions of other Courts of Appeal. Further, even granting for the sake of argument, that the Court had the power to allow the withdrawal and amendment, it did not abuse its discretion in declining to allow petitioner to begin its action anew. The law of Illinois is that injunction shall issue, if at all, only at the behest of a party whose damages are or will be irreparable. The Illinois Appellate Court has so held in a specific construction of § 73-9. *222 East Chestnut Street Corp.* v. *LaSalle National Bank*, 15 Ill. App. 2d 460 (1958). The Illinois Supreme Court has held that petitioner had not established that it was damaged by the actions of the respondents. *222 East Chestnut Street Corp.* v. *Board of Appeals*, 10 Ill. 2d 130 (1956).

The Federal Rules of Civil Procedure nowhere expressly prohibit the raising of affirmative defenses by a motion to dismiss. The requirement that such defenses be specially pleaded when set up by answer is designed to preclude the proof of affirmative defenses under a general denial and the risk of surprise, if on general issue such matters were proven. (Rule 8 (c), Federal Rules of Civil Procedure.)

Granting for the sake of argument that some of the defenses raised by motion in the instant case are affirmative defenses, still respondents had the right to elect to present these defenses by motion. (Rule 12 (b), Federal Rules of Civil Procedure.)

The fact that the defense of *res judicata* was supported in part by matters outside the record, none of which were controverted, does not preclude its consideration. As respondents have elsewhere shown (pages 12 and 13, this brief), it has long been the federal practice to consider affirmative defenses by motion when the facts are uncontroverted.

Petitioner contends that the rule is construed otherwise in some circuits. In support of this assertion it cites *Sarda* v. *McGrath* (D.C. Cir. 1952), 196 F. 2d 20, which decided only that a synopsis of certain deportation proceedings which was buried in defendant's brief and memo of points and authorities did not constitute an "affidavit" and could not be considered as a matter outside the pleadings in the determination of the motion to dismiss. In *Herron* v. *Herron* (C.A. 5, 1958), 255 F. 2d 589, cited by petitioner, the Court held that a motion raising the defense of the Statute of Limitations was improperly sustained not because the motion raised an affirmative defense but because there was a genuine issue of a material fact and because the lower court insisted on trying the action by affidavits and interrogatories. In *Boudidge* v. *Lehmann* (C.A. 6, 1958) 252 F. 2d 266, cited by petitioner, the Court made summary dismissal of the complaint on its own motion. The parties had no notion that such dismissal was being considered. The reviewing court reversed the decision below because it could not determine from the record before it whether or not there was a genuine issue of a material fact.

Respondents grant that, if matters outside the pleadings are considered on a motion based, as theirs is in part, on plaintiff's failure to state a claim upon which relief could be granted, the motion is to be treated as one for summary judgment. In a word, respondents agree that genuine issues of material fact may not be resolved by affidavits. However, respondents earnestly contend that, in the case at bar, there are no facts in dispute, indeed no controversy, between the parties to this action, and that the procedure followed in the District Court and affirmed by the Court of Appeals was proper within the letter and the spirit of the Federal Rules of Civil Procedure.

In fact, the Court of Appeals cited the relevant statutes of Illinois in the light of the undisputed fact that petitioner had pursued and exhausted the exclusive remedy created by the Illinois Administrative Review Act in a test of the legality of the structure here involved. In this case, there is no genuine issue of any material fact between petitioner and the respondents.

For this reason, the petition should be denied.

CONCLUSION.

We submit that this petition is without merit. This case is not within the jurisdiction of this Court. There is no federal question involved. There is no case or controversy to which the judicial power of the United States can extend. The supposed federal question which petitioner urges before this Court was not raised in the Court below nor there decided, and the decision of the Court of Appeals is not in conflict with decisions of other circuits on the same matter.

The decision below has no substantial significance in federal jurisprudence and we therefore urge that the petition for writ of certiorari be denied for lack of jurisdiction and want of merit.

Respectfully submitted,

JOHN S. MILLER,
134 South La Salle Street,
Chicago 3, Illinois,

HOWARD B. BRYANT,
30 North La Salle Street,
Chicago 3, Illinois,

RALPH B. MACK,
JOHN W. G. DOOLEY,
38 South Dearborn Street,
Chicago 3, Illinois,

Attorneys for Lakefront Realty Corporation and Lake Shore Club.

ALBAN WEBER,
619 Clark Street,
Evanston, Illinois,
Attorney for Northwestern University,

JOHN C. MELANIPHY,
Corporation Counsel of
City of Chicago,
SYDNEY R. DREBIN,
Assistant Corporation Counsel,
511 City Hall,
Chicago 2, Illinois,

Attorneys for City of Chicago, a municipal corporation; Richard J. Daley, individually and as Mayor of the City of Chicago; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago.